United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 76-4043

United States Court of Appeals
FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION,

Petitioner,

v.

JOHN SCAFFIDI,

Respondent.

BRIEF FOR PETITIONER

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914—CR 1-4096

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It is the string piece that is the area of the pier prov

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Statement

This is a petition for review by the Pittston Stevedoring Corporation from an order of the Benefits Review Board, U.S.D.L. (hereinafter referred to as the employer and Board respectively), which affirmed a decision and order (75-LHCA-23) of Administrative Law Judge Thomas F. Howder, which found that the injury and permanent partial disability sustained by respondent, John Scaffidi came within the purview of the Longshoremen's and Harbor Workers' Compensation Act (LHCA) as amended.

Questions Presented

1. Whether the claimant's injury is within the coverage of the Act, as amended.

2. Whether the extension of the Act's coverage to the land is constitutional.

Summary of Argument

One: The 1972 amendments to the Act do not afford coverage and consequent benefits of the act to the respondent, John Scaffidi injured under such circumstances as are hereinafter outlined. The respondent, John Scaffidi was not engaged in the loading or unloading of ships within the meaning of the amended Act, and his injury did not occur upon such site as would afford coverage under the Act as amended.

Two: The amendments to the Act extending coverage to an accident occurring on land to the respondent, John Scaffidi, who was not actually engaged in loading or unloading a vessel, would result in an unconstitutional invasion of State's rights and serves to permit an impermissible invasion of an area without the parameters restricted by the time-honored limitations of admiralty and maritime jurisdiction.

Statement of Facts

The respondent was a truck driver a member of the International Longshoremen's Association, Local 1277, a maintenance local working in the maintenance department of the employer, Pittston Stevedoring Corporation, on March 12, 1973 (A46-49).

On the day in question, he was in the course of transferring certain containers loaded with cargo from Pier 12, Brooklyn, New York, to another pier denominated State Pier, in the same borough, distant 1 to 1½ miles one from the other (A32).

It was necessary to traverse some ten blocks of public roadway in the course of the journey from Pier 12 to State Pier (A24).

On arriving at State Pier, the container was opened and the respondent was struck by falling cargo and sustained personal injuries (A26).

It has been stipulated for the record that the respondent Scaffidi was totally disabled to September 9, 1973, a period of 25-6/7 weeks; that his average was in excess of $250.00 and that he would be entitled to the maximum compensation rate of $167.00 per week. It was further stipulated that he suffered a permanent partial loss of use of 9% of the right arm and 10% of the left foot. He has been paid benefits for 25-6/7 weeks, a total of $2,090.00 under the prevailing New York State Workmen's Compensation rate structure (A12-13).

The petitioner herein is a stevedoring company which occupies and utilizes certain piers and terminals in the New York port area. It employs a labor force among which are men to load and unload ships; others transfer cargo from the first point of impact on the string piece to a point of rest in a terminal area; others called extra labor or terminal operators then transfer the cargo from the point of rest to a loading platform and then by hand and by various mechanical contrivances to trucks (A41-42).

In addition the petitioner employs timekeepers, checkers, billing clerks, bill of lading clerks, maintenance men, truck drivers, safety men, first aid men, and numerous other individuals only some of whom handle cargo in the process of loading and unloading vesels (A60-64).

This claim was initially controverted on the ground that it came within the provisions of the New York State Workmen's Compensation Law; that there was no justification within the United States Department of Labor because of the inapplicability of the amendments of 1972 of the LHCA; and on the further grounds that the respondent was at the time of his accident employed as a truck driver; and on the further ground that the statute as amended, to wit, Section 2, subdivisions (3) and (4) and Section 3, subdivision (a) are unconstitutional in application.

POINT I

Whether the claimant's injury is within the coverage of the Act, as amended.

The petition for review involves an individual in the employ of an employer as defined in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, et seq., who was injured doing work for his employer in an area known as a marine terminal. In order to arrive at a proper determination of the controversy, a close examination of the statute as amended, with particular reference to the outer limits of its geographical application and the occupational status of the injured worker, must be conducted.

It is necessary to determine the status of the employee at the time he was hired, the exact location of his injury, and the service that he was performing for the said employer at the time of injury.

Prior to the 1972 amendments, the authorities are in agreement that the Act did not provide benefits to a stevedore employee injured on land, in spite of the fact that he may have been directly and actively engaged in loading or unloading a vessel.

> *Nacirema Operating Company, Inc.* v. *Johnson,* 396 U.S. 212, 90 S.Ct. 347 (1969).

In amending the Act, Congress changed the statutory definition of "employee". (LHCA Sec. 902(3)) and also the definition of "employer" (Sec. 902(4)). In addition, it extended shoreward from the edge of the water, the situs of injuries for which benefits under the Act could be paid to those employees coming within the purview of the definition as amended and imposed liability upon those employers who came within the amended definitions.

It cannot be argued that every employee of a stevedore who sustains an injury anywhere on a pier performing any function whatsoever is now within the purview of the Act.

If it had been the intention of the Congress to so extend that coverage, it would have not been necessary to insert the many limiting phrases appearing in amended section 2(3) and (4); and Section 3 of the Act would have been superfluous.

In its definition of the terms employee and employer, Congress bestowed certain limitations of coverage within the Act by the use of the terms "maritime employment" "longshoremen", "longshoring operation", and "other adjoining area customarily used by an employer in loading, unloading * * * a vessel".

Each of these limiting phrases clearly indicate that it was the congressional intent to extend the coverage of the Act only to certain stevedore employees, who were injured in certain areas of the pier and who in fact were performing certain well-defined, specific functions.

Therefore unless the injured employee meets the eligibility requirements of the amended statute, his claim is limited only to the applicable State compensation law.

In the instant case it is the position of the petitioner herein, that the claim now under review is not compensable under the Act, because it was not incurred in an employment or in a place which comes within the purview of the Act.

The term "longshoring operations" at the time of the 1972 amendments, was defined by the United States Department of Labor at 29 CFR 1918-3(i) as

> "The loading, unloading, moving or handling of cargo, ship stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States."

The above definition is also to be found in the Safety and Health standards for maritime employment, Section 29 CFR, Part 1915 of the General Standards for all Industries published by the Occupational Safety & Health Administration (OSHA), U.S.D.L. In Part 1918 denominated "Longshoring" the OSHA regulations relate to the handling of cargo between ship and dock, and equipment regulations are limited to that hoisted to and used on board a vessel, or are used on the pier to load or unload a vessel.

There is no OSHA standard applicable to the movement of cargo into or out of a warehouse, or onto a truck or other mechanical contrivance unless there is a direct uninterrupted movement to or from a vessel.

It is clear that maritime jurisdiction ends and local jurisdiction commences when the cargo is delivered to an area on a wharf or a dock to await the instructions of the consignee as to its disposition. (Harter Act, 46 U.S.C. 190, et seq.).

Neither delay in delivery to the consignee, nor the time period in which the cargo remains on the pier can extend the application of maritime law. Indeed after the deposition of discharged cargo upon the pier, the duty of the stevedore to the ship is terminated and a new and different liability arises between the carrier and the consignee which legal relationship is determinable by state law.

> *Leathers Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800 (1971).

The law of bailment is then in effect and the cargo having reached a point of rest is then available for tender and delivery.

> *North American Smelting* v. *Moller Steamship Company,* 204 F.2d 384;
> *Calcot, Ltd.* v. *Isbrandtsen Company,* 318 F.2d 669;

Kinderman & Sons v. *N.Y.K. Lines,* 332 F.Supp. 939.

It seems inescapable therefore, that the terms "longshoreman" and "longshoring operations", concern activities directly related to a vessel.

It would seem therefore that the term "maritime employment" relates to a vessel either by way of the handling of its cargo, or its construction, repair or breaking.

None of these terms can be expanded to include the operation of motor vehicles, railroad cars, containers, hi-lo's or other mechanical contrivances of land transportation or warehouses or terminals.

The indispensible ingredient for the application of the term "maritime employment" and its connection to "longshoring operation" is a vessel upon navigable waters.

> "That longshoremen injured on the pier in the course of loading or unloading a vessel are legally distinguished from longshoremen performing similar services on a ship is neither a recent development nor particularly paradoxical."

Victory Carriers v. *Law,* 404 U.S. page 212.

It is clear, therefore, that the 1972 amendments were enacted solely to extend to longshoremen on the pier, in the course of loading and unloading a vessel, the coverage and benefits formerly limited to those fellow-longshoremen performing like services on board a ship. The extension shoreward from the water's edge to the areas above defined was limited only for a certain kind of employee, to make him co-equal with an individual who was performing essentially the same function while on board a vessel.

It is useful to employ the term "covered employee" because that phrase is utilized in both Senate Report No.

92-1125, at page 13, and House Committee Report No. 92-1441 at page 11, and it appears as follows:

> "The committee does not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo."

If the Congress had intended to extend the benefits under the Act as amended to each and every employee of a covered employer, it would not have amended the definition of employee as it then stood in Section 902(3) of the LHCA.

The fact that Congress did modify the definition of employee with the use of the limiting language as noted heretofore, is indicative of its intent to limit coverage to specific employees performing specific functions within the area of maritime employment.

The Court in

> *ITO Corporation of Baltimore, et al.* v. *William T. Adkins, et al.,* 4th Cir. 1975 decided 12/22/75 —— F.2d ——,

and the Ninth Circuit

> In *Weyerhauser Company* v. *Gilmore,* 9th Cir. 1975 decided 12/5/75 Reh. Den. Feb. 9, 1976,

had recourse to these committee reports and the statement of the floor leader of the bill, Senator Williams, in concluding that there was a limiting feature in the extension of coverage. That limiting feature being obviously those employees who are actually engaged in loading and unloading ships cargo.

It is submitted therefore that the congressional use in the Act of the term "longshoring operations" was a deliberate effort by Congress to limit the coverage extension to those persons as noted above.

It is noted that the congressional record, Senate July 21, 1971, contains the following:

> "Many of the workers covered by this Act are engaged in extremely hazardous work, for longshoring is one of the most dangerous of any occupations. Indeed marine cargo handling ranks the highest of all injuries in terms of injuries per man hours of work.
>
> It is therefore, especially appropriate that we now enact legislation which will insure more adequate compensation for these workers and their families."

The individuals actually engaged in the highly dangerous work of marine cargo handling were the ones Congress sought to protect by the Act.

It is only those persons actually handling cargo that are exposed to the hazards created by both shipboard and pier base machinery used in the actual process of loading and unloading. It is they who are protected by the Act.

> "Loading ships is a dangerous occupation. This is inherent in the nature of the business. It is probably for this reason that Congress has provided Workmen's Compensation for longshoremen, which plaintiff admittedly received in the present instance."
>
> *Colantuono* v. *North German Lloyd Line,* 223 F. Supp. 381, 383.

It is apparent therefore that Congress limited the extension of benefits only to those who at the time of injury were actively engaged in loading or unloading a vessel and who were injured in an area customarily used for vessel loading and unloading.

There must be the conjunction of the two, the process of loading or unloading and the area generally used in such operation.

One not so engaged or injured at a place not used for loading or unloading a vessel is relegated to State Workmen's Compensation benefits because in that instance he is not an employee as defined in Section 2, subdivision (3) of the Act.

In the instant case, respondent Scaffidi was not engaged in either loading or unloading of a vessel. Indeed he was not in the area in which such was usually accomplished.

He had transported a loaded container which had been unloaded at Pier 12 in Brooklyn, New York, to another pier denominated State Pier, distant about 1½ miles geographically one from the other.

He went through public streets for approximately ten blocks until he arrived at State Pier. It was while at State Pier that the injury occurred and it happened during the course of unloading the container which he had transported.

It is contended that it was not the intention of Congress to cover all accidents which occurred on a pier in any location even though the accident victim might have been denominated a longshoreman.

The accident must occur in that portion of the pier that is customarily used in loading and unloading a vessel. There is no parity between the unloading of a container and the unloading of a vessel.

It is obvious that Congress could have included the entire area of the pier if it had been its intent to include it within the coverage of the Act by not utilizing the express term "used by an employer in loading, unloading, etc."

It is generally known that the pier is composed of certain distinct areas.

It is the string piece that is the area of the pier proximal to the water. It is on the string piece that cargo is discharged and it is on the string piece that drafts of cargo to be loaded aboard a vessel are constructed by longshoremen.

That is the area which comes within purview of the terms "customarily used for either the loading or unloading of a vessel". It is to that area that coverage is extended beyond the so-called Jensen line.

It is beyond question also that there are sharp and distinct delineations observed throughout the maritime industry which define and separate the loading and unloading function from the terminal, warehouse, or transshipment function.

This line of demarcation has been noted by Congress because an extraction of the written report reveals the following:

> "To take a typical example, cargo whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf or terminal adjoining the navigable waters. The employees who perform this work would be covered under the bill for injury sustained by them over the navigable waters or on the adjoining land area."

This storage or holding area noted by the committee is known as the "point of rest" throughout the entire United States.

It is at that juncture where the unloading of cargo stops and where the loading of export cargo begins.

In the vast majority of ports in this country, the loading, unloading of vessels and the movement of cargo between the vessel and the "point of rest" is performed by longshoremen employed by stevedore companies.

Those longshoremen are unquestionably covered by the Act. This petitioner has accepted jurisdiction in many cases all involving the loading and unloading of vessels and the movement of cargo between the vessel and the point of rest.

It seems fairly obvious also that the loading and unloading process is but one of the functions performed by a stevedore company. There is handling and movement of cargo within the terminal prior to the unloading process and subsequent to the unloading process. Cargo is transferred to railroad cars, trucks and other mechanical devices. In addition containers are loaded by terminal warehouse employees who are in the employ of the marine terminal operators.

The point of rest is the dividing line between stevedoring and terminal operations and longshoring and warehousing operations.

It is a term which has been in use in this industry and has been utilized by the various regulatory agencies having jurisdiction of this industry and is referred to in many documents which emanate from labor management publications which have reason to comment on the stevedore marine terminal business.

American President Lines Ltd. v. *Federal Maritime Board,* 317 F.2d 887 (CA-D.C.—1972).

The Federal Maritime Commission under the Shipping [illegible] of 1916, 46 U.S.C. 801 et seq., in regulating the eco[illegible]ic function of marine terminal operators as to bulk [illegible]oes has stated:

"* * * Point of rest shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of out-

bound cargo from shippers for vessel loading." 46 CFR 533.6(C).

It seems beyond question that the Congress and the Department of Labor, which has jurisdiction over maritime affairs and the industry in general, are fully aware of and have long recognized the distinct separation of longshoring functions from marine terminal functions.

It is to the former that the Congress intended to apply the Act as amended and to the latter it did not.

Of necessity, the services performed by terminal operators, including railroad car and truck unloading, storage of cargo, issuance of dock receipts and their concomitants are usually charged against the cargo or to the party who requests the service, the consignee.

The services are outlined and the charges mandated in marine terminal tariffs filed with the Federal Maritime Commission.

On the other hand, longshore functions performed by a stevedoring company are rendered only to the vessel; are charged to the vessel or its agents and are not published in any tariff filed with the Federal Maritime Commission.

The functions are different. The actual risks or the potential risk are substantially different and the Congress recognized this when it drew the line of coverage between the LHCA and the applicable state laws at the same line that the marine industry traditionally has drawn between longshore employment and marine terminal operator functions. That line is commonly denominated the point of rest. Recognizing as we do that the area involved in the loading and unloading process is just as hazardous to individuals working on the pier as to those working upon a ship, the extension of coverage to the areas heretofore noted while the loading or unloading function is being performed cannot be said to be unreasonable.

There was no logical reason for the distinction in coverage between the two classes of individuals. Since they share the same perils of employment and since the degree and severity of injury was common to both the amendment to the Act seems to be a response to the determination of the Supreme Court in *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 90 S.Ct. 418.

In the instant claim, however, the respondent Scaffidi was not subjected to such dangers and he was not in an area where such danger would be likely. He was on a loading platform as a truck driver and obviously could not claim kinship in job or purpose with those actually engaged in the loading or unloading process.

It would serve no useful purpose at this juncture to re-emphasize the differences between stevedores and marine terminal operators.

It is certain that this court is well-aware of the different functions performed by each and the regal responsibilities to different persons which arise out of the performance of such functions.

Indeed it would appear that these distinctions and those between municipal terminal operators will be well-covered in briefs of other counsel.

POINT II

Whether the extension of the Act's coverage to the land is constitutional.

Article 3, Section 2, clause 1 of the Constitution of the United States extends judicial power to all cases of admiralty and maritime jurisdiction.

No legislation is valid, however, if it contravenes the essential purpose expressed by an act of Congress or

works material prejudice to the characteristic features of the General Maritime Law. * * *

Southern Pacific Company v. *Jensen,* 244 U.S. 205.

Congress' power to legislate in the areas of admiralty and maritime jurisdiction is derived through an interpretation of Article 1, Section 8, Clause 18 of the United States Constitution.

It would appear therefore that the extension and broadening of admiralty and maritime jurisdiction is limited by determinations of the Federal Courts.

Detroit Trust Company v. *Steamer Thomas Barlum,* 293 U.S. 21, 55 SCR 31 (1934).

As the Court pointed out in that case, the amendment and revision of maritime law by Congress is necessarily limited by the concept of admiralty and maritime jurisdiction.

In reference to the 1972 amendments to the LHCA, if these are to be construed to cover an accident, such as occurred to the respondent Scaffidi, when he was not in an area customarily used by the employer for unloading or loading of a vessel and was not actually engaged in such process, then said extension must be deemed unconstitutional.

As a condition precedent to the exercise of admiralty or maritime jurisdiction, the accident causing injury must happen upon navigable waters of the United States.

The purpose of the legislation initially was to provide coverage for workers who could not be recompensed under State Workmen's Compensation Acts.

As a consequence of such determination there was a limited application of the Act and accidents occurring on

the land to an individual who might be denominated a longshoreman were, before the 1972 amendments, within the jurisdiction of the appropriate State authorities. The exercise of jurisdiction by either the State or the federal authorities was governed by the happenstance of the locus of the accident and it was generally agreed that the gangplank was the point of differentiation.

> *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 92, S.Ct. 418.

In cases subsequent to Victory Carriers, *supra,* accidents occurring on the land end of the gangplank were held not to be within admiralty jurisdiction as late as 1974.

> *McCullum* v. *United International Corporation,* 494 F.2d 501 (1974).

The limitation on maritime jurisdiction was clearly delineated in

> *Earles* v. *Union Barge Line Corporation,* 486 F.2d 1097.

> "In maritime law, the locality of the tort traditionally governs the scope of maritime jurisdiction. While state law governs torts occurring on land and piers and docks are extensions of this land, the gangplank serves generally as a dividing mark with maritime law being applied to those torts which occur upon navigable waters, when the wrong bears a significant relationship to traditional maritime activity or which occur on land but are caused by a ship on navigable water. Navigable waters are those waters in the United States which afford a channel for useful commerce."

It is apparent from a reading of the cases that maritime jurisdiction does not extend to every accident occurring upon a navigable waterway.

To come within said jurisdiction the situs requirement is mandated but there must also be some relationship to traditional maritime service. This obviously was the reasoning of the Ninth Circuit in *Gilmore, supra,* when it noted

> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters, with the further condition that the injury producing the disability occurred on navigable waters as defined in Section 903."

In its opinion the court quoted with approval the following:

> *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972) and
> *Onley* v. *South Carolina Electric and Gas Company,* 488 F.2d 758 (4th Cir. 1973).

To the same effect there are determinations in

> *Whittington* v. *Sewer Construction Company, Inc.,* 367 F.Supp. 1328 and
> *Jiles* v. *Federal Barge Lines, Inc.,* 365 F.Supp. 1225.

It is clear, therefore, that the Supreme Court has indicated without question that such jurisdiction, i.e., maritime and admiralty, does not apply to accidents occurring on land; and even concerning those accidents that occur on navigable waters jurisdiction will not attach unless there is the direct connection to traditional maritime activity.

It would appear that in the instant case the respondent Scaffidi is without maritime jurisdiction.

To afford to the 1972 amendments a construction which would include the accident to the respondent Scaffidi in maritime jurisdiction would be such an impermissible extension as to render the amendments unconstitutional.

We are well aware that certain injuries occurring on land may be within admiralty and maritime jurisdiction of the United States provided that there is a direct link between the injury and some act or omission of a vessel then located upon navigable waters.

Admiralty Extension Act, 46 U.S.C. 740.

There is in the instant case no evidence that anything untoward happened aboard the vessel from which the container was discharged so as to bring this case within the exceptions noted.

CONCLUSION

The decision and order of the Benefits Review Board should be reversed and the claim dismissed with costs to petitioner.

Dated: March 29, 1976.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Stephen Lashley, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 256 West 139th Street, New York, New York
That on March 30, 1976, he served 1 copies of Appendix and 2 copies of Brief for Petitioner
on

Israel, Adler, Ronca & Gucciardo, Esqs.,
Attorneys for Respondent,
160 Broadway
New York, New York 10038

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Stephen Lashley

Sworn to before me this
30th day of March, 1976

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977